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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

FEDERAL ENERGY REGULATORY COMMISSION AND JAMES B. EDWARDS, SECRETARY OF ENERGY
Appellants,

v.

THE STATE OF MISSISSIPPI, *et al.*,
Appellees.

On Appeal from the United States District Court for the Southern District of Mississippi

BRIEF OF SOUTHEASTERN LEGAL FOUNDATION, INC., AMICUS CURIAE

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INTEREST OF AMICUS CURIAE

Southeastern Legal Foundation, Inc. ("Southeastern") is a non-profit corporation organized in 1976 for the purpose of advancing the consideration of public interest viewpoints in adversarial proceedings involving significant issues. In particular, Southeastern has been active in many forums urging greater respect for individual rights and liberties. Such advocacy is often most necessary in order to counter unauthorized assertions of power by government.

This Court has permitted Southeastern to file amicus curiae briefs in a number of cases during its past few terms and most recently has permitted our appearance in *Common Cause, et al. v. Harrison Schmitt,*

et al., U.S. Supreme Court Docket No. 80-847, and *Federal Election Commission v. Americans For Change, et al.*, U.S. Supreme Court Docket No. 80-1067.

Southeastern participated as the only amicus curiae in the instant case before the district court and now wishes to continue that participation before this Court. The parties to this appeal have consented to the filing of this brief. Copies of their consent letters have been filed with the Clerk of this Court.

This case is of particular interest to Southeastern and its supporters as it arose in Mississippi, one of the states within Southeastern's main region of activity. In addition, as proponents of individual freedom and limited government, Southeastern and its supporters have a strong interest in helping to determine the proper limits of federal power over state governmental activities. The resolution of the federalism issues in this appeal will have a lasting affect upon the rights of all citizens and their ability to influence government, both state and federal.

Finally, the exercise of federal power through the Public Utility Regulatory Policies Act of 1978, Pub.L. No. 95-617, 92 Stat. 3117 *et seq.* ("PURPA"),[1] also has an impact upon the regulation of utilities and the availability and use of energy in the states. These

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[1] Unless otherwise noted, Southeastern's references to PURPA throughout this brief are limited to Title I, 16 U.S.C. (Supp. III) §§ 2611-2644; 42 U.S.C. (Supp. III) §§ 6801-6808, Title III, 15 U.S.C. (Supp. III) §§ 3201-3211, and to Section 210 of Title II, 16 U.S.C. (Supp. III) § 824a-3.

questions touch all citizens and groups, including Southeastern and its supporters.

For these reasons, Southeastern submits this brief to urge this Court to note probable jurisdiction and to affirm.

SUMMARY OF ARGUMENT

This case presents a controversy over the constitutionality of a law which seeks to achieve federal energy goals by using the governments of the states as the tools of implementation. At issue is whether or not the Congress has chosen an acceptable means for achieving its desired results. The answer to that question will resolve not only this appeal, but will also draw the boundary lines for future exercises of congressional power as applied to the states. This case thus has significant implications for the future of our system of federalism.

Southeastern believes that the portions of PURPA involved in this appeal undermine the role of the states as sovereign units in our republic by aggrandizing congressional power over state activities. As applied to the states, it is not the "cooperative federalism" appellants have described in their Jurisdictional Statement. Rather, PURPA employs what could better be termed "coercive federalism" to achieve its ends.

PURPA cannot be justified as a proper exercise of the Commerce Power. It is aimed directly at a subject of regulation not reachable by the Commerce Power, the sovereign governmental actions of the states. Moreover, the interference of PURPA with state gov-

ernmental acts is not justifiable as appropriate in light of a national emergency, for PURPA does not constitute true emergency legislation.

Finally, the Tenth Amendment prevents the Congress from forcing the states to perform actions upon federal demand, for such impositions upon state freedom are inconsistent with our federal system.

ARGUMENT

Important Issues of Federalism and the Limits of Congressional Power Are Present in this Appeal and Should Be Fully Heard by this Court.

A. Coercive Federalism is at work through PURPA.

PURPA operates, not as a benign suggestion to the states, or as a condition which the states may voluntarily choose in exchange for federal assistance, but as an edict which cannot be ignored.

In enacting PURPA, Congress did not preempt state regulation of electric and gas utilities. In all likelihood the political outcry from such an absorption of state power would have been deafening. Instead, Congress sought to achieve its ends by making the states do the work. The State of Mississippi saw clearly that this approach would reduce it to the role of a "robot" or "lackey" performing at the whim of the federal government, as the district court so colorfully put it, and initiated this lawsuit.

The State of Mississippi is better placed than South-

eastern to fully appreciate PURPA's interference with its governmental prerogatives. We merely highlight what we perceive to be PURPA's most flagrant consumptions of state governmental freedoms.

PURPA imposes many non-optional demands for affirmative conduct upon the states. In Title I, 16 U.S.C. (Supp. III) §§ 2611-2644; 42 U.S.C. (Supp. III) §§ 6801-6808, and Title III, 15 U.S.C. (Supp. III) §§ 3201-3211, PURPA requires state regulatory agencies to act affirmatively by considering for adoption various federal substantive standards which PURPA treats as supplementing state law. 16 U.S.C. (Supp. III) § 2621; 15 U.S.C. (Supp. III) § 3203. Although appellants make much of the retained freedom of the state agencies to choose or not to choose these standards, that choice can only be exercised under the conditions imposed by PURPA. *See* 16 U.S.C. (Supp. III) §§ 2621-2626, 2631, 2632; 15 U.S.C. (Supp. III) §§ 3203-3205, 3209. These conditions include procedural requirements and rules in the consideration of the standards, 16 U.S.C. (Supp. III) §§ 2621-2625; 15 U.S.C. (Supp. III) §§ 3203, 3204, the creation of standing for certain persons to intervene in rate-related proceedings, 16 U.S.C. (Supp. III) § 2631; 15 U.S.C. (Supp. III) § 3205, the preparing and filing of reports with appellant Secretary of Energy according to deadlines, 16 U.S.C. (Supp. III) § 2626; 15 U.S.C. (Supp. III) § 3209, and the completion of the consideration of the standards by a certain date, 16 U.S.C. (Supp. III) §§ 2622, 2623; 15 U.S.C. (Supp. III) § 3203. In specified circumstances, utilities are liable for the costs incurred by intervenor consumers who participate in the standards consideration pro-

ceedings, 16 U.S.C. (Supp. III) § 2632, and they are, of course, subject to whatever requirements the state regulatory agencies must impose in order to comply with PURPA.

Section 210 of PURPA, 16 U.S.C. (Supp. III) § 824a-3, goes so far as to order the states to undertake the implementation of rules to be promulgated by appellant Federal Energy Regulatory Commission ("FERC") in the area of energy cogeneration. Under this section, the states must either carry out FERC's orders by following the rules adopted by that federal agency or be subjected to FERC's enforcement remedies in federal court.

Neither the requirement to consider standards nor the cogeneration scheme allow the states to refuse to perform the duties imposed upon them by PURPA. In the sense that the cogeneration mandate forces the states to undertake the administration of an ongoing federal program, it actually places a greater burden upon the administrative services of the states than does the standards consideration scheme. Nevertheless, both features of PURPA impose federal restrictions upon the freedom of the state regulatory agencies to decide for themselves what they will do.

PURPA also imposes coercive federalism upon state courts and state legislatures. Enforcement mechanisms built into the law create standing in state courts for certain persons who desire to obtain judicial review of decisions by state regulatory agencies pertaining to PURPA standards and requirements, 16 U.S.C.

(Supp. III) § 2633; 15 U.S.C. § 3207.[2] The Secretary of Energy is also provided with the status of amicus curiae in state courts in PURPA standards review cases. *Id.* The state courts are given no choice in these matters.

Likewise, state legislatures, which have always been able to exercise their legislative power to shape remedies and standing in state courts, are deprived of this prerogative in the PURPA arena. Depending on the specific state in question, PURPA may also impose upon state legislatures an additional burden of taking whatever action is necessary to assist state regulatory agencies and courts in complying with the mandates of PURPA.

For all the variety of mechanisms employed by PURPA, the sum total of its parts is a massive intrusion upon the governmental activities of the State of Mississippi and her sister states. The coercive approach of PURPA is not consistent with the limitations imposed upon the Congress by the Commerce Clause and the Tenth Amendment.

B. The enactment of PURPA was not a valid exercise of the Commerce Power.

One of the most important issues of this appeal is brushed aside too lightly by appellants in their Juris-

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[2] The Section 210 cogeneration provisions can be enforced by FERC against the states according to the enforcement provisions of the Federal Power Act, or, if FERC does not act, enforcement may be requested in federal court by certain utilities, cogenerators or small power producers. 16 U.S.C. (Supp. III) § 824a-3(h).

dictional Statement. Before examining the Tenth Amendment question, appellants briefly assert that there can be no "serious dispute" that the Commerce Clause provides Congress with authority for the enactment of PURPA. Jurisdictional Statement at 14. Appellants' position fails to appreciate that PURPA does not operate to regulate interstate commerce and thereby does not satisfy the basic justification for Commerce Power legislation.

Although Congress declared, in Section 2 of PURPA, 16 U.S.C. (Supp. III) § 2601, that it was regulating interstate commerce through the regulation of energy, what the Act really does is to regulate state governmental activities. PURPA does not regulate energy or commerce in energy. The state governmental activities which are the subject of regulation under PURPA do not in and of themselves constitute a species of interstate commerce subject to the Commerce Power.

State governmental power and interstate commerce are distinct:

> The *power of states over commerce* has no more been recognized as *commerce* than has the *power of Congress which is derived from the Commerce Clause.* Each find their source in the Constitution. Both are of the same family and genus, although not of the same species. The power of the states must yield to Federal power in order to effectuate Federal supremacy, not because the power of the states is commerce. This distinction between commerce and governmental power to regulate commerce, we suggest, was recognized by Mr. Chief Justice Hughes when he observed, "The subject of federal power is still 'com-

> merce,' and not all commerce but commerce with foreign nations and among the several states." *Santa Cruz Co. v. Labor Board*, 303 U.S. 453, 466 . . . (1937). We also believe that Mr. Justice Harlan recognized this distinction in *Maryland v. Wirtz*, . . . 392 U.S. [183] at 196 . . . [(1968)], when he quoted Mr. Chief Justice Hughes' observation to demonstrate that the Commerce Power would not disable the Court from preventing "the utter destruction of the State as a sovereign political entity."

Brown v. EPA, 521 F.2d 827, 839 (9th Cir. 1975), *vacated*, 431 U.S. 99 (1977) (remanded for consideration of mootness), *reinstated in part*, 566 F.2d 665 (9th Cir. 1978).

If Mississippi were in the business of actually operating utilities, rather than regulating them, Congress would be able to directly impose obligations upon the state *qua* utility operator. Mississippi would then stand on the same footing as California in *United States v. California*, 297 U.S. 175 (1936), where Congress was found to have Commerce Power over that state's operation of a railroad. Such conduct is no different from that which private enterprise could perform. However, if the particular activity of state government is uniquely governmental, and could not be conducted by private enterprise, the governmental activity may not be subjected to congressional exercise of the Commerce Clause.

The activities regulated by PURPA are uniquely governmental. Private persons or organizations cannot legislate, set regulatory policy, decide issues of standing or provide judicial remedies. These activities

involve exercises of sovereign state power. As such, they are not commerce subject to congressional dictate.

Appellants' assumption to the contrary allows them to argue that PURPA is justified as an exercise of the Commerce Power, despite its effect on the states, because it was enacted "to combat a national emergency." *National League of Cities v. Usery*, 426 U.S. 833, at 853 (1976) ("*Usery*") (where this Court discussed its decision in *Fry v. United States*, 424 U.S. 542 (1975) ("*Fry*")).

The situation in *Fry* was quite distinct from that which is presented in this appeal, and appellants' reliance upon the "national emergency" justification is misplaced. In *Fry*, this Court upheld the Economic Stabilization Act of 1970, which granted to the president authority to freeze the wages of state and local government employees, "as an emergency measure to counter severe inflation that threatened the national economy." *Fry, supra* at 548. The freeze of wages was activated in 1971, shortly after the law was enacted, and applied across-the-board to virtually all employees of states and local governments. Designed to meet an urgent problem, the law was implemented expeditiously and had broad impact upon the nation's economy. Thus, the Economic Stabilization Act of 1970 was, in fact, emergency legislation which immediately addressed a temporary situation. Even though the law may have intruded somewhat upon the prerogatives of the states, this Court saw it as an appropriate exercise of the Commerce Power "tailored to combat a national emergency." *Usery, supra*, at 853.

In contrast, PURPA cannot be classified as emer-

gency legislation because it, in fact, was not "tailored" to meet an emergency situation. As compared to a law which commands immediate response and which has immediate effect in order to meet an emergency, PURPA assumes a measured response by the states extending over a period of years and provokes no immediate and substantive response to an emergency situation. Its very content thus belies the label of emergency legislation. If Congress had wanted to act in an expeditious manner designed to counter emergency conditions, direct means were available to it.[3] In this context, some very limited and temporary interference with state freedom might have been justifiable. However, Congress did not exercise its other options and did not fashion emergency legislation through PURPA. As a consequence, PURPA cannot be saved by the justification of "national emergency."

C. PURPA is inconsistent with Principles of Federalism and the Tenth Amendment.

Federal regulations using a method requiring certain action by the states according to federal conditions, much in the manner of PURPA, were rejected by several federal courts only a few years ago. Although this Court later vacated the decisions on grounds of mootness, the Courts of Appeals for three circuits agreed that the Environmental Protection Agency had overstepped its authority when it required the states to administer and to enforce a federal regu-

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[3] These means would, of course, have been bounded by the caution expressed in Wilson v. New, 243 U.S. 332, 348 (1917), that "an emergency may not call into life a power which has never lived."

latory program. *Maryland v. EPA*, 530 F.2d 215 (4th Cir. 1975), *vacated sub nom. EPA v. Brown*, 431 U.S. 99 (1977); *District of Columbia v. Train*, 521 F.2d 971 (D.C. Cir. 1975), *vacated sub nom. EPA v. Brown*, 431 U.S. 99, *reinstated in part and remanded in part sub nom. District of Columbia v. Costle*, 567 F.2d 1091 (D.C. Cir. 1977); *Arizona v. EPA*, 521 F.2d 825 (9th Cir. 1975), *vacated sub nom. EPA v. Brown*, 431 U.S. 99 (1977), and *Brown v. EPA*, 521 F.2d 827 (9th Cir. 1975), *vacated*, 431 U.S. 99 (1977), *reinstated in part*, 566 F.2d 665 (9th Cir. 1978). *Contra, Pennsylvania v. EPA*, 500 F.2d 246 (3d Cir. 1974) (where the court relied heavily on *Maryland v. Wirtz*, 392 U.S. 183 (1968), which was later overruled by this Court in *Usery*).

The EPA program was comparable to PURPA in that it required specific conduct by the states and used the administrative structures of the states to implement the goals pursued by the EPA regulations. In striking down the EPA rules, the District of Columbia Circuit Court held that:

> [T]he exercise of federal power based solely on the commerce clause, cannot against a state's wishes compel it to become involved in administering the details of the regulatory scheme promulgated by the [EPA] Administrator. . . . [T]he attempt to require the state to "establish" each of the retrofit programs and to "evaluate and approve devices for use in this program," . . . is an impermissible encroachment on state sovereignty and goes beyond "regulation" by the Congress. It seeks, under the guise of the commerce power, to substitute compelled state regulation for permissible federal regulation. If the

federal government wants to impose a program under federal authority, it is limited by the restrictions applicable thereto.

* * *

In essence, the Administrator is here attempting to commandeer the regulatory powers of the states, along with their personnel and resources, for use in administering and enforcing a federal regulatory program against the owners of motor vehicles. The situation is not too dissimilar from one that would have existed during Prohibition if the Federal Government had sought to compel police officers in a wet state to enforce the federal laws on that subject. Under the regulations here, the states are to function merely as departments of the EPA, following EPA guidelines and subject to federal penalties if they refuse to comply or if their regulation of vehicles is ineffective. *We are aware of no decisions of the Supreme Court which hold that the federal government may validly exercise its commerce power by directing unconsenting states to regulate activities affecting interstate commerce, and we doubt that any exist.*

District of Columbia v. Train, supra at 992 (emphasis added).

The rationale of the *District of Columbia v. Train* decision is especially applicable to the methods of regulation used by PURPA. Through Titles I and III of PURPA, the states are compelled to consider federal standards under and according to conditions imposed by the Congress. Through Section 210 of PURPA, the states are told to implement and administer rules

promulgated by FERC. Through these requirements, Mississippi has been compelled without its consent to regulate activities affecting commerce. Such compelled regulation is constitutionally invalid.

The view of the District of Columbia Circuit Court in *District of Columbia v. Train* with respect to the limits of the Commerce Power is consistent with this Court's holding in *Usery*. Relying on the Tenth Amendment, this Court ruled that Congress may not impose its authority upon the states as states in a manner which "directly displace[s] the States' freedom to structure integral operations in areas of traditional governmental functions." *Usery, supra* at 852. Such an "exercise of congressional authority does not comport with the federal system of government embodied in the Constitution" and is "not within the authority granted Congress by Art. I, § 8, cl. 3." *Id.*

In *Usery*, this Court dealt with action by the Congress which had attempted to displace the ability of the states to structure employee-employer relationships in a way that had an adverse impact on the states' decisions regarding such areas as fire prevention, police protection, sanitation, public health, and parks and recreation. These activities were regarded as "typical of those performed by state and local governments in discharging their dual functions of administering the public law and furnishing public services." *Usery, supra* at 851. It was the withdrawal by Congress of the function of *decision-making*, which would leave "little left of the States' 'separate and independent existence.'" *Id.* (citing *Coyle v. Oklahoma*, 221 U.S. 569, 580 (1911)).

Southeastern believes that the thresholds set forth in *Usery* have been crossed by PURPA's many pervasive interferences with state government. Its method of interference is not the direct regulation of energy itself, but the direct regulation of state government decision-making. It thus imposes strictures upon the most sovereign aspect of state existence, that of the exercise of power reserved to the states and to the people.

PURPA interferes with the independent decision-making function of the government of Mississippi in every area — legislative, administrative, and judicial. If the states are deprived of the ability to make those fundamental decisions as to how state courts will be operated, what laws it chooses to pass within constitutional bounds and how its regulatory agencies will be operated, then there will be little left of the states' independence that will make them distinguishable from the federal government as separate entities existing in their own sovereign right.

When a law is so pervasive as PURPA in its usurpation of state independence, mere reference to whether or not the federally-purported area of regulation is a "traditional state function" is not enough to help determine the constitutionality of the attempted federal regulation. A look at the total impact on the present and potential ability of the states to function with "a separate and independent existence" as a result of the federal interference is imperative. PURPA's interference is so pervasive, both in what it does to state decision-making and in its potential for future congressional interference in other areas, that it presents a real and substantive decrease in the independence and separate identity of the states. In this manner PURPA

surely impairs "the States' 'ability to function effectively in a federal system. . . .' " *Usery, supra* at 852 (citing *Fry, supra* at 547 n.7).

CONCLUSION

PURPA contains assertions of congressional authority over the states which, if left unchecked, can " 'allow the National Government [to] devour the essentials of state sovereignty. . . .' " *Usery, supra* at 855 (citing Justice Douglas' dissent in *Maryland v. Wirtz*, 392 U.S. 183, 205 (1968)). To preserve the states as independent sovereigns in our republic, working with, rather than for, the federal government, it is imperative that Titles I and III and Section 210 of Title II of PURPA, as they apply to the States, be declared unconstitutional.

For the foregoing reasons, this Court should note probable jurisdiction, and, after plenary consideration, affirm the opinion of the district court.

Respectfully submitted,

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